PANG LIM v. CHINA INSURANCE CO. LTD.

[P.C. (Lord Diplock, Viscount Dilhorne, Lord Fraser of Tullybelton, Lord Keith of Kinkel and Sir Robin Cooke) June 26 and July 18, 1978]

[Privy Council Appeal No. 2 of 1977]

Road Traffic — Motor car insurance — Application for first class policy — Comprehensive policy issued — Deletion of clause relating to insured driving car not belonging to him — Insured driving friend's car — Whether policy covered risk — Road Traffic Ordinance, 1958, s.74(1).

Insurance — Motor car insurance — Comprehensive policy — Deletion of indemnity clause relating to insured driving car not belonging to him — Application for rectification of policy.

This was an appeal from the decision of the Federal Court ([1975] 2 M.L.J. 239). The appellant had met with an accident while driving a friend's car. The friend's policy of insurance covered liability to third parties when driving with the friend's permission. The appellant was the owner of a car in respect of which he was insured by the respondents under a comprehensive policy from which there had been deleted a printed clause extending cover to the insured in respect of liability to third parties while driving a motor car not belonging to him. The appellant had applied for a first class policy and had been issued with a comprehensive policy. If the printed clause, notwithstanding its deletion, were a term of the contract between the appellant and his insurers, the respondents, the respondents would have been liable to indemnify the appellant against any liability to third parties incurred while driving his friend's car. In that event the friend's insurers would be entitled to recover from the respondents at least part of the damages that they had paid to the victims of the accident. An action was accordingly started in the name of the appellant against the respondent claiming rectification of the policy by reinstating Clause 2(b). The action had been dismissed in the High Court and on appeal in the Federal Court.

Held, dismissing the appeal: (1) a comprehensive policy in respect of a vehicle is one which covers all risks arising out of the use of that particular vehicle and does not necessarily incorporate an extension to cover the liability of the assured to third parties when driving any other private car;

(2) in this case the policy issued to the appellant with the Clause 2(b) deleted conformed to the bargain that was made between the parties.

PRIVY COUNCIL APPEAL FROM MALAYSIA.

R. Rougier Q.C. (*Lim Kean Chye* with him) for the appellant.

Charles Fletcher Cooke Q.C. (*Nigel Murray* with him) for the respondents.

Cur. Adv. Vult.

Lord Diplock (delivering the judgment of the Board): On April 4, 1971, the appellant, the nominal plaintiff in this action, Mr. Pang, was driving a friend's motor car with the friend's permission. He drove it negligently and, as a result, deaths and serious injuries were caused and heavy damages were recovered against Mr. Pang. As is compulsory under section 74(1) of the Road Traffic Ordinance, 1958, the friend's policy of insurance included an Authorised Driver Clause under which Mr. Pang was covered against liability to third parties when driving with the friend's permission.

Mr. Pang was himself the owner of a Volvo car in respect of which he was insured by the respondent the China Insurance Company under a policy from which there had been deleted a printed clause (section II, clause 2(b)) extending cover to Mr. Pang in respect of liability to third parties when personally driving a private motor car not belonging to him and not hired to him under a hire purchase agreement. If the printed clause, notwithstanding its apparent deletion, were a term of the contract of insurance between Mr. Pang and his insurers, the China Insurance Company Limited, they would have been liable to indemnify Mr. Pang against any liability to third parties incurred while driving his friend's car. In that event, the friend's insurers would be entitled to recover from the China Insurance Company at least part of the damages that they had paid on Mr. Pang's behalf to the victims of the accident. An action was accordingly started in Mr. Pang's name against the China Insurance Company claiming rectification of the policy by reinstating clause 2(b).

The policy was signed and issued by the China Insurance Company on October 30, 1970, for the period from October 7, 1970, to October 6, 1971. It was not the first motor vehicle policy that Mr. Pang had taken out with the China Insurance Company. On June 1, 1970, he had bought a Volvo car from the authorised distributors, Federal Auto, Alor Star, of which the manager was a Mr. Lim Koon Sia, who acted as agent for the China Insurance Company in arranging insurance in respect of cars sold by Federal Auto. The policy obtained for Mr. Pang in respect of that car was described on its face as a "Motor Car Policy (Comprehensive)". It contained the same deletion of section II, clause 2(b), as did the later policy which is the subject of the present action; and, as was proved at the trial, the usual form in which comprehensive policies were issued by the China Insurance Company from 1968 onwards had contained a similar deletion.

In October 1970, Mr. Pang traded in the original Volvo he had bought in June in part exchange for a new one from Federal Auto. As on the previous occasion he asked Mr. Lim to arrange what he described in Chinese as "First class policy" for the substituted vehicle. As Mr. Pang did not speak English Mr. Lim filled in the proposal form for him acting in this respect on Mr. Pang's behalf and not as agent for the insurance company. The form required the proposer to state "Particulars of vehicles in respect of which insurance is applied for" and whether a "Comprehensive Third Party or 'Act only' cover" is required. Mr. Lim filled in the particulars of the new Volvo and a request for "Comprehensive" cover. He issued to Mr. Pang before he drove the new car away a combined cover note and certificate of insurance which stated that Mr. Pang "having proposed an insurance in respect of the motor car described in the schedule below the risk is hereby held covered in terms of the Company's usual form of Comprehensive Policy applicable thereto for the period from 9 a.m. on October 7, 1970 to midnight on October 6, 1971". It was in replacement of this cover note that the policy was issued and signed by the China Insurance Company on October 30, 1970.

At the trial of the action in the High Court, Hashim Yeop A. Sani J. held that Mr. Pang got what he bargained for — a comprehensive policy in the usual form issued by the China Insurance Company. His judgment was upheld unanimously on appeal to the Federal Court.

In both the High Court and the Federal Court, reliance was sought to be placed on various instructions issued by the Malaysian Insurance Association to its members, of which the China Insurance Company was one. These, as the Federal Court pointed out, were *res inter alios acta* and this line of argument was not proceeded with before their Lordships' Board. So the only question left in issue is whether the policy issued with section II, clause 2(b), deleted did conform to the bargain that Mr. Lim had made, on behalf of the insurance company, with Mr. Pang.

In their Lordships' view, Hashim Yeop A. Sani J. and the Federal Court were clearly right in holding that it did. The proposal form was a request by Mr. Pang for a "comprehensive" cover in respect of a particular vehicle, the Volvo which he had just bought. In their Lordships' view, a comprehensive policy in respect of a vehicle is one which covers all risks arising out of the use of that particular vehicle and does not necessarily incorporate an extension to cover the liability of the assured to third parties when driving any other private car. The cover note issued on behalf of the company by Mr. Lim in response to that proposal was expressed to cover the risk "in terms of the Company's usual form of Comprehensive Policy". It was proved in evidence that the company's usual form of comprehensive policy did not incorporate any such extension and Mr. Pang, who had previously been insured in respect of his previous car under a comprehensive policy in the China Insurance Company's usual form, knew or ought to have known that it was one in which section II, clause 2(b), was deleted.

Their Lordships will accordingly advise His Majesty the Yang di-Pertuan Agong that this appeal should be dismissed and that the appellant must pay the respondents' costs of this appeal.

Appeal dismissed.

Solicitors: *Philip Conway Thomas & Co.; Le Brasseur & Oakley.*

SINGAPORE REPORTS

ONG BENG HOW v. GUAN SENG SAWMILL (PTE.) LTD.

[C.A. (Wee Chong Jin C.J., Choor Singh and Kulasekaram JJ.) November 27, 1975]
[Singapore — Civil Appeal No. 24 of 1975]

Labour Law — Factories — Injury from dangerous part of machinery — Unfenced machinery — Careless or inattentive worker — Whether contributory negligence — Factories Act (Cap. 123), s. 22(1).

Torts — Negligence — Machinery unfenced in factory — Careless or inattentive worker — Whether contributory negligence.

Factories — Machinery unfenced — Factories Act (Cap. 123), s. 22(1).

Machinery — Unfenced — Careless or inattentive worker — Factories Act (Cap. 123), s. 22(1).

In this case the appellant was employed by the respondents. He was cutting pieces of timber by means of a power saw when his left forearm came into contact with its circular saw blade and he received an injury which necessitated the amputation of his left hand above the wrist. The learned trial judge found that the respondents were in breach of their statutory duty under section 22(1) of the Factories Act in that they had not securely fenced the power-driven circular saw blade, which was clearly a 'dangerous' part' of the power saw unit. He found however that as the appellant was "unable to give a coherent account of how the accident occurred" he must have been inattentive and careless and he was therefore contributorily negligent to the extent of 50%. The appellant appealed.

Held, allowing the appeal: (1) even assuming that the appellant was inattentive or careless, such conduct, could not constitute contributory negligence in this type of case where there had been a breach of statutory duty. Fencing is intended to protect not only the prudent, alert and skilled operator intent upon his task but also the careless or inattentive worker whose inadvertent or indolent conduct may expose him to risk of injury or death from the unguarded part;

(2) the appellant having established the respondent's breach of statutory duty which gave him a right to damages, it was for the respondents to prove contributory negligence and this they had failed to do;

(3) on the evidence in this case, the learned trial judge was not justified in drawing the inference that the appellant was guilty of contributory negligence.

Cases referred to:-

(1) *Tay Cheng Teck v. Tropical Produce Co. Pte. Ltd.* [1971] 2 M.L.J. 247, 249.

(2) *John Summers & Sons* v. *Frost* [1955] A.C. 740.

(3) *Ng Kay Thiam & Anor.* v. *Redhill Paper Converters Ltd.* [1971] 2 M.L.J. 256.

(4) *Caswell* v. *Powell Duffryn Associated Collieries Limited* [1940] A.C. 152.

(5) *Staveley Iron & Chemical Co. Ltd.* v. *Jones* [1956] A.C. 627.

In the court below (Suit No. 128 of 1974) *Karuppan Chettiar* appeared for the plaintiff and *Patrick Ong* for the defendants. The following judgment was delivered:

D'Cotta J.: The plaintiff's claim is for damages for personal injuries and consequential loss suffered by him and occasioned to him on April 16, 1973 in the course of his employment with the defendants as a factory hand at the defendant's sawmill at Lorong Bistari, Singapore by the negligence of the defendants their servants or agents in the conduct and management of the said sawmill and/or breach by the defendants of their duty as employers of the plaintiff to